CIMB Securities Sdn Bhd v Lau May Foong

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–244 OF 1998
KAMALANATHAN RATNAM J
11 DECEMBER 1998

Agency *— Principal or agent — Whether defendant contractng as agent or as principal — Whether defendant personally liable*

Civil Procedure *— Service — Notice of demand — Service by AR registered post returned unclaimed — Whether plaintiff shall be responsible for consequence of notice not being received by defendant*

The plaintiff and the defendant entered into a written agreement ('the letter of offer') under which the plaintiff agreed to provide the defendant with credit to finance the defendant's purchase of securities. Upon breach of the provisions of the letter of offer, the plaintiff demanded all monies owed by the defendant under the letter of offer. The defendant failed to comply with the demand. The deputy registrar awarded judgment to the plaintiff. The defendant appealed. The defendant contended, inter alia, that: (i) she entered into the agreement merely as an agent and therefore was not personally liable; (ii) there was a certain 'put option' between the plaintiff and one Omega Securities Sdn Bhd and a certain collateral contract which could absolve her from liability; and (iii) she did not receive the plaintiff's written demand for payment.

Held, dismissing the appeal with costs:

(1) If an agent contracts in such a manner as to hold himself as being personally responsible, he cannot subsequently escape liability personally whether or not his principal was or was not known at the time of the contract. In this case, there was nothing in the documents between the parties to suggest that the defendant was only an agent of a principal. In fact, the language agreed to by both parties evinced an uninterrupted intention to hold the defendant personally liable (see pp 58D–E).

(2) There was vast discrepancy in the letter said to have contained the alleged 'put option' and the averment of the defendant that the option was executed almost 11 months earlier. Further, the letter was not a put option as alleged by the defendant. At most, the letter could be construed as a contract between Omega Securities Sdn Bhd and the plaintiff (see pp 58H–59A).

(3) The plaintiff had sent the notice of demand to the address provided by the defendant, and pursuant to cl 20.1 of the letter of offer, the plaintiff shall not be responsible for the consequence of the notice not being received by the defendant. In any case, the plaintiff had shown that the demand notice was sent to the defendant at the address provided by the defendant herself for the purposes of correspondence (see p 59D–F).

[Bahasa Malaysia summary

Plaintif dan defendan telah mengikat perjanjian bertulis ('surat tawaran') di bawah mana plaintif bersetuju untuk memberikan kredit kepada defendan bagi membiayai belian sekuriti oleh defendan. Apabila berlakunya kemungkiran peruntukan surat tawaran, plaintif menuntut semua wang yang dihutang oleh defendan di bawah surat tawaran. Defendan telah gagal mematuhi tuntutan itu. Timbalan pendaftar mengawardkan penghakiman kepada plaintif. Defendan merayu. Defendan menghujahkan, antara lain, bahawa: (i) ia mengikat perjanjian tersebut cuma sebagai ejen dan maka tidak bertanggungjawab dalam keupayaan peribadi; (ii) terdapat suatu 'put option' yang tertentu di antara plaintif dan Omega Securities Sdn Bhd dan suatu kontrak kolateral yang tertentu yang boleh membebaskannya daripada liabiliti; dan (iii) ia tidak menerima tuntutan bertulis plaintif untuk bayaran.

Diputuskan, menolak rayuan dengan kos:

(1) Sekiranya seoran ejen mengikat kontrak dalam cara hinggakan mengatakan dirinya bertanggungjawab dalam keupayaan peribadi, ia tidak boleh kemudiannya mengelak liabiliti peribadi sama ada atau tidak prinsipalnya diketahui atau tidak diketahui pada masa kontrak diikat. Dalam kes ini, tiada apa-apa dalam dokumen di antara pihak-pihak untuk mencadangkan bahawa defendan hanyalah sekadar ejen prinsipal. Malahan, bahasa yang dipersetujui oleh kedua-dua pihak menunjukkan hasrat yang tidak terganggu untuk menjadikan defendan bertanggungjawab dalam keupayaan peribadi (lihat ms 58D–E).

(2) Terdapat percanggahan besar dalam surat yang dikatakan mengandungi 'put option' dan penegasan defendan bahawa opsyen dilaksanakan hampir 11 bulan lebih awal. Selanjutnya, surat tersebut bukanlah suatu 'put option' seperti yang dikatakan oleh defendan. Paling tinggi, surat tersebut boleh ditafsirkan sebagai suatu kontrak di antara Omega Securities Sdn Bhd dan plaintif (lihat ms 58H–59A).

(3) Plaintif telah menghantar notis tuntutan ke alamat yang diberikan oleh defendan, dan menurut fasal 20.1 surat tawaran, plaintif tidak bertanggungjawab atas akibat notis tidak diterima oleh defendan. Apa sekalipun, plaintif telah menunjukkan bahawa notis tuntutan telah dihantar kepada defendan di alamat yang diberikan oleh defendan sendiri untuk tujuan surat-menyurat (lihat ms 59D–F).]

Notes

For a case on whether a defendant is contracting as agent or as principal, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 657.

Cases referred to

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413 (refd)

Arab Malaysian Finance Bhd v Choong Chin Shoong [1998] 1 AMR 284 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

K Kumar (*Krish Maniam & Co*) for the appellant/defendant.
Augustine Poh (*Cheong Kee Fong & Co*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

The plaintiff and the defendant entered into a written agreement on 28 January 1997 ('the letter of offer') under which the plaintiff agreed to provide the defendant with credit to finance the defendant's purchase of securities upon terms and conditions stated in the said letter of offer. In respect of the credit facilities issued under the said letter of offer, the defendant executed in favour of the plaintiff a mortgage deed dated 29 January 1997 over the securities accounts, the mortgaged assets and mortgaged securities as referred to in the said mortgage deed. The parties transacted pursuant to the said letter of offer.

In breach of the provisions of the said letter of offer, the defendant failed to provide the plaintiff with further and other securities and/or collateral acceptable to the plaintiff as required by the plaintiff. The plaintiff then decided that no further credit would be extended to the defendant.

Case for plaintiff

In the circumstances, all monies owed by the defendant under the letter of offer became due and payable to the plaintiff on demand pursuant to cl 8 of the letter of offer which reads as follows:

> 8 Accelerated payment
>
> The credit hereby extended shall cease to be available to the Client and the whole of the outstanding balance, interest thereon and all other monies owing by the Client hereunder shall become due and immediately payable on demand by CIMBS if:
>
> 8.1 the Client shall fail to pay any sum payable by the Client hereunder or under any of the Security Documents on its due date or (if such sum is payable on demand) upon demand;
>
> 8.2 the Client (or any guarantor) shall fail to comply with any provision under this letter or any of the Security Documents; or

8.3 CIMBS in its sole and absolute discretion determine without having to assign any reason therefore that no further credit shall be extended to the Client. A

The defendant failed and refused to pay the plaintiff's demand of the outstanding sum of RM1,317,479.01 due as at 4 March 1998 with other relief. The deputy registrar upon an application for summary judgment awarded as follows: B

(i) The sum of RM1,317,479.01.

(ii) General damages to be assessed, including all the legal costs and expenses incurred by the plaintiff in connection with the enforcement or preservation of the plaintiff's rights under the letter of offer and under the said mortgage, or resulting from, arising out of or in connection with transactions in securities of the defendant. C

(iii) Costs on a solicitor client basis.

(iv) Interest on the sum(s) awarded herein at the rates pursuant to, and in accordance with the provisions of, cl 5 of exh LML-1 of encl 3. D

This is the defendant's appeal against the deputy registrar's decision.

Case for the defence

The defendant raised various issues. It was contended by the defendant that she entered into the agreement as reflected by the letter of offer and the deed of mortgage merely as an agent for someone else and therefore was not personally liable. She also contended that there was a certain 'put option' between the plaintiff and one Omega Securities Sdn Bhd and a certain collateral contract between the plaintiff and one Patrick Lim which could absolve her from liability. It was also her case that the transactions which gave rise to the sum outstanding were not authorized by the defendant and that in any case the certifications appearing in the statements of account which the plaintiff says rendered the statements binding on and conclusive against the defendant, are null and void. She also contended that she did not receive the plaintiff's written demand for payment. E F G

Findings of the court

Once the plaintiff has made out a prima facie case, the onus shifts to the defendant to show cause why judgment should not be entered against her. A mere assertion in an affidavit does not ipso facto provide leave to defend. If the defendant's assertion in the affidavit is not credible, then there is no fair or reasonable probability of the defendant having a real or bona fide defence. Although ordinarily it is not appropriate for a judge to resolve conflicts of evidence by relying on affidavits, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statement made by the same deponent or however H I

inherently improbable it may be. If, having examined the affidavit evidence, the court finds that the defendant has failed to show that there is a fair or reasonable probability that he has a bona fide defence even though he had made some assertions in his affidavit, the court should allow the plaintiff's application.

In fact, Mohamed Azmi SCJ very lucidly set out the law in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408A–F wherein his Lordship said:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.
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> ...
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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

Issue of agency

In respect of the issue of agency raised by the defendant, *Bowstead on Agency* (15th Ed) states at p 445 as follows:

> The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a deed, bill of exchange, promissory note or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction of which is a matter of law.

It also states on the same page:

> The following rules have, however, appeared in previous editions and still seem valid starting points.
>
> (i) If the contract is signed by the agent in his own name without qualification, he is deemed to have contracted personally unless a contrary intention plainly appears from other portions of the document.

And at p 448, it states as follows:

> Where it appears from the terms of a written contract made by an agent that he contracted personally, extrinsic evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable on it, because such evidence would be contradictory to the written contract.

The rule against the admission of extrinsic evidence is clearly embodied in ss 91 and 92 of our Evidence Act 1950 and reflected in the Federal Court judgment of *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124. This was also a case where the defence pleaded was the involvement of a third party. The plaintiffs sued the defendants for a sum being the balance of the price of goods sold and delivered. The defendants pleaded denying liability and claiming that it was made known to the appellants at the time of the order that the ultimate buyer was a third party or that the defendants were in fact contracting as agents for a third party. The plaintiffs' application for summary judgment after being disallowed by both the senior assistant registrar and the judge on appeal, was finally allowed by the Federal Court. In rejecting the defendant's plea of agency the Federal Court held at p 125H–I:

> ... We feel that this course of action is not open to the respondents, as it is clear that under s 92 of the Evidence Act, 1950, oral evidence to contradict, vary, add to or subtract from, the terms of any contract, grant or other disposition of property which has been reduced in writing is not admissible.

It is obvious therefore and I hold that if an agent contracts in such a manner as to hold himself as being personally responsible, he cannot subsequently escape liability personally whether or not his principal was or was not known at the time of the contract. In any case, referring to the case before me, I find that the parties' contractual relationship and the contractual provisions are clearly and expressly set out and contained in the letter of offer and the deed of mortgage. I find that there is nothing in these documents to suggest that the defendant is only an agent of a principal. In fact, the language agreed to by both parties evince an uninterrupted intention to hold the defendant personally liable. For instance cl 6 of the letter of offer states: 'The Client (the defendant) will pay to CIMBS (the plaintiff) ...' and cl 2.1 of the Mortgage Deed provides '... the Mortgagor irrevocably and unconditionally covenants to pay on demand ...'. I have no hesitation in concluding that it was the intention of the parties to be bound to each other as appearing from the terms of the two written documents before me. In the circumstances, this issue of agency as raised by the defendant must fail.

The issue of 'put option' and 'collateral contract'

The defendant averred that there was a 'put option' between the plaintiff and one Omega Securities Sdn Bhd executed sometime in January 1997. The plaintiff denied this in its affidavit. In an attempt to refute this, the defendant produced a copy of letter dated 24 December 1997 from Omega Securities Sdn Bhd and addressed to the plaintiff and claimed that this letter contained the alleged 'put option'. I cannot accept this. Whilst the said letter was dated 24 December 1997, the defendant had averred that the said option was executed almost 11 months earlier, that is in January 1997. This vast discrepancy has not been explained. Further, the letter from Omega Securities Sdn Bhd dated 24 December 1997 and addressed to the plaintiff conveyed a definite undertaking by Omega Securities Sdn Bhd to purchase or cause to be purchased from the plaintiff certain shares at a certain price

A and payment of which was to be made on a specified date. To my mind, this was not a put option as alleged by the defendant. Clearly, the defendant's own averments and statements contradict themselves.

In addition thereto, the defendant was unable to state any facts on which she had based her allegation that the plaintiff had entered into the B alleged oral agreement. Not only that, she had even failed to state the source of her information or grounds of belief that there was such an oral agreement to which she was not a party.

Even if I were to accept the letter from Omega Securities Sdn Bhd to the plaintiff, at most the letter could be construed as a contract between C Omega Securities Sdn Bhd and the plaintiff.

Non receipt of demand

The plaintiff's Margin Finance Manager, one Low Mun Ling, had affirmed an affidavit stating that the demand notice was sent to the defendant by way D of AR registered post and that the said letter dated 4 March 1998 and addressed to the defendant at the address provided by the defendant for purposes of correspondence, was returned with the remarks 'Unclaimed'. Having read cl 20.1 of the letter of offer, I am satisfied that the plaintiff had sent the said notice of demand to the address provided by the defendant, and that pursuant to the same clause, the plaintiff 'shall not be responsible E for the consequence of any notice, demand ... not being received by the Client'. The law journals are replete with authorities on the deeming provisions of a letter of demand subsequent to being sent (see *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 and *Arab Malaysian Finance Bhd v Choong Chin Shoong* [1998] 1 AMR 284).

F In any case the plaintiff has shown that the said demand notice was sent to the defendant at the address provided by the defendant herself for the purposes of correspondence. This she has not denied. Her answer was she did not receive the letter because it was sent to an address which was not hers. Having specifically provided that same address as her correspondence address, it is totally improper for the defendant to now claim otherwise. I G am even prepared to infer that the defendant intended to mislead the plaintiff into giving a wrong address so that she can subsequently avail herself of this plea.

That she did not authorize the transaction

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I totally reject this issue. Monthly statements of account were sent to the defendant from January 1997 till March 1998 and she never protested. Further, confirmation letters of all transactions were transmitted by facsimile to the defendant at the facsimile number provided by her. Again, there was no protest from her. It is for the defendant to have taken the first I available opportunity to denounce and to reject the said statements. Having failed to do so, she is now estopped from denying the said authorizations.

Statements not conclusive

It is also the defendant's contention that the certifications appearing on the statement of account, which the plaintiff says rendered the statements binding on or conclusive against the defendant are null and void. Again, this contention is untenable. Low Mun Ling who affirmed the affidavit on behalf of the plaintiff has stated that the outstanding amount of RM1,317,479.01 as at 4 March 1998, was duly certified by her as correct and that she is an authorized officer of the plaintiff. I therefore have no hesitation in concluding that the statements of account in the case before me are conclusive against the defendant.

In any case, even if the certifications were for any reason null and void (which I do not so find), there would still be no reason for the defendant to contend that she is not liable, because even if the statements of account were without the special quality of conclusiveness as envisaged under cl 15 of the letter of offer, they would nonetheless be evidence of the defendant's indebtedness and since the correctness of these statements have not been disproved or contradicted by the defendant, the defendant's indebtedness is therefore held to be established.

I have considered every issue raised by the defendant and find each and every one of them unmeritorious. This appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee